

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To Be Argued By:
Anthony Limitone, Jr.

75-7544

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7544

B

ARTHUR T. DAVIDSON, M.D.,
Plaintiff-Appellant

-against-

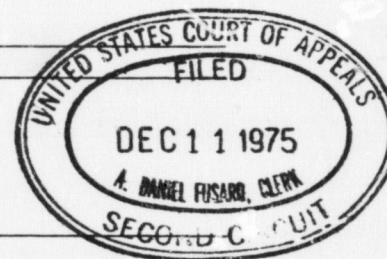
DONALD F. TAPLEY, M.D. Dean of Columbia University
College of Physicians and Surgeons

and

KEITH REEMTSMA, M.D., Director, Department of Sur-
gery Columbia University College of Physicians
and Surgeons,

Defendants-Appellees

APPELLEES' BRIEF



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Preliminary Statement

Plaintiff Arthur T. Davidson, acting pro se, appeals from an order and judgment of the United States District Court for the Southern District of New York (Bonsal, J.), dismissing his complaint because the court lacked jurisdiction over the subject matter and because the claims were time-barred. This appeal was taken pursuant to 28 U.S.C. §1291.

Questions Presented

1. Did the District Court err in dismissing plaintiff's Title VII claim for lack of subject matter jurisdiction because the plaintiff filed his charge with the Equal Employment Opportunity Commission more than three years after the last alleged act of discrimination occurred?

2. Did the District Court err in dismissing plaintiff's claim under 42 U.S.C. §1983 as time-barred?

Statement of the Case

a) The Nature of the Case

In the court below, the plaintiff-appellant, acting pro se, (hereinafter "the plaintiff") alleged that the defendants-appellees terminated his employment because he is black. Jurisdiction was asserted under Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. §2000e et seq.], 42 U.S.C. §1983, and 28 U.S.C. §1343. The plaintiff is a surgeon who was employed by Columbia University at Harlem Hospital and Delafield Hospital between 1964 and 1969. His employment was terminated on September 30, 1969.

The named defendants-appellees, Drs. Tapley and Reemtsma, are respectively the Dean of Columbia University's College of Physicians and Surgeons and the Chairman of Columbia University's Department of Surgery, and are joined solely in their representative capacity. The defendants-appellees shall be collectively referred to as "the University."

b) The Original Complaint

The plaintiff filed his original complaint, captioned Davidson v. Quash,* 74 Civ. 1262 (S.D.N.Y.) on March

* At the time the complaint was filed, Dr. Eugene Quash was Acting Director of Surgery at Harlem Hospital and was sued solely in his representative capacity. He was dropped as a defendant when the amended complaint was filed.

19, 1974. After the answer was served and filed, the plaintiff moved for summary judgment and the University cross-moved for dismissal of the complaint. By order signed on March 6, 1975, the court denied plaintiff's motion for summary judgment, and granted the University's motion to dismiss the complaint, giving the plaintiff leave to file and serve an amended complaint. Plaintiff appealed from this order. That appeal was dismissed on May 27, 1975.

c) The Amended Complaint

On March 5, 1975, approximately one year after filing the first complaint, plaintiff filed a second complaint under a new docket number, captioned Davidson v. Tapley et al., 75 Civ. 1090 (S.D.N.Y.), [hereinafter the "Tapley" action]*. The University moved pursuant to FRCP Rule 12(b) to dismiss this second complaint. Because plaintiff was acting pro se, Judge Bonsal assumed, for the purpose of the University's motion, that plaintiff's second complaint was the amended complaint permitted by his order of March 6, 1975.

d) Disposition Below

In a memorandum decision dated August 20, 1975, [hereinafter the "Tapley" decision"] the court below found

* All references to papers filed under the Quash docket number shall be preceded by "Quash"; all references to papers filed under the Tapley docket number shall be preceded by "Tapley."

that the last act of discrimination alleged was the termination of the plaintiff's employment on September 30, 1969. The court ruled that it lacked jurisdiction over the plaintiff's Title VII claim, since his EEOC complaint was filed late. The court also held a three year statute of limitations, established by Section 214(2) of the New York Civil Practice Law and Rules, barred plaintiff's claims under 42 U.S. §1983.

In accordance with the court's decision, the amended complaint was dismissed by order dated September 12, 1975. Plaintiff appeals from that order.

Statement of Facts

In the spring of 1964, the plaintiff was appointed to Harlem Hospital's medical staff as an attending surgeon [Quash Complaint, ¶4; Tapley Complaint, ¶5] and was assigned the duties of Chief of Surgical Section B. [Quash Answer, ¶8] The University later reassigned the plaintiff to the position of surgeon in Surgical Section A, effective July 1, 1967. [Quash Answer, ¶8] As a result of this reassignment, the plaintiff charged the University with racial discrimination and filed complaints with the New York City Commission on Human Rights and in the New York Supreme Court. [Quash Answer, ¶9] Subsequently, the plaintiff entered into a conciliation agreement with the University and withdrew these charges. [Quash Answer, ¶10; Quash Answer Ex. 1]

Pursuant to that agreement, the plaintiff received two years of special training in cancer research and teaching at the University's College of Physicians and Surgeons between 1967 and 1969, during which time he received a salary. [Quash Complaint, ¶12; Tapley Complaint, ¶13] Thereafter, the University and the plaintiff were unable to agree on the plaintiff's future position at the University, and his employment was terminated on September 30, 1969. [Quash Complaint, ¶12; Tapley Complaint, ¶13]*

More than three years after his termination, on February 14, 1973, the plaintiff filed a charge of racial discrimination with the United States Equal Employment Opportunity Commission (hereinafter "the EEOC"). [Quash Complaint, ¶15; Tapley Complaint, ¶15] The EEOC referred the complaint to the New York State Division of Human Rights. After investigation, the State Division dismissed the complaint with a finding of no probable cause. [Quash Complaint, ¶16; Tapley Complaint, ¶15; Quash Answer, Ex. 2] In so doing, the Division specifically found that the plaintiff had not applied for reemployment at the University after September 30, 1969. [Quash Answer, Ex. 2; Tapley Decision, p.6]

* The plaintiff's alleged claim for re-employment under the conciliation agreement is presently the subject of litigation in the New York Supreme Court for Westchester County, Davidson v. Columbia University, et al., Index No. 2755/71. [Tapley Decision, p. 7]

Thereafter, on March 19, 1974, the plaintiff commenced this action. In both the original and the amended complaints, the plaintiff admitted that he was discharged on September 30, 1969. He also admitted that he had filed his charge with the EEOC only on February 14, 1973, approximately three and a half years later. [Quash Complaint, ¶15] To overcome this obvious defect, the plaintiff alleged that he had continuously applied for reemployment at Harlem Hospital after his termination. [Quash Complaint, ¶14; Tapley Complaint, ¶14] He failed, however, to offer any evidence in support of this claim. [Tapley Decision, pp. 5-6] As a result, the court below dismissed the amended complaint.

Point I

The Court Below Properly Dismissed the Plaintiff's Title VII Claims

Under Sub-section 706(e) of Title VII of the Civil Rights Act of 1964, as amended, an aggrieved party must file a complaint with the EEOC within 180 days after the alleged discriminatory act occurred.

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred..." [42 U.S.C. §2000e-5(e)]

Compliance with this time limitation is a jurisdictional prerequisite to the maintenance of a civil action in federal

court.

Weise v. Syracuse University, _____ F.2d _____,
10 FEP Cases 1331, 10 EPD ¶10,294 (2nd Cir., 1975)

DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 309
(2nd Cir., 1975)

Collins v. United Air Lines, Inc., 514 F.2d 594
(9th Cir., 1975)

Accordingly, the court below lacked jurisdiction over the plaintiff's Title VII claims since he had filed the EEOC charge more than three years after his termination.

The plaintiff tried to avoid the effect of his delay by asserting that his discharge created a "continuing wrong." However, as recognized by the district court, a discharge from employment is an isolated and completed act.

Collins v. United Air Lines supra

Olson v. Rembrandt Printing Co.,
511 F.2d 1228, 1234 (8th Cir., 1975)

Loo v. Gerarge, 374 F.Supp. 1338 (D.Hawaii,
1974)*

Nor can the plaintiff find any solace in his allegations that he periodically applied for reemployment.

* As the district court noted, the decisions holding to the contrary involved collective bargaining agreements requiring a continued course of discrimination, or a stated policy whereby subsequent recalls were expected and in fact made. See, e.g., Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970). Neither of those circumstances were present in this action. [Tapley Decision, p. 5]

Such broad conclusory statements, unsupported by specific factual allegations, are insufficient as a matter of law to withstand a motion to dismiss.

Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F.2d 620 622-23 (2nd Cir., 1972) cert. denied 410 U.S. 944 (1973)

Avins v. Mangum, 450 F.2d 932 (2nd Cir., 1971)

Birnbaum v. Trussell, 347 F.2d 86, 89-90 (2nd Cir., 1965)

In any event, there was no evidence of any such applications, and all of the material before the court demonstrated that the plaintiff had not applied for reemployment. [Tapley Decision, pp. 5-6]

Point II

The Court Below Properly Dismissed the Claims Under 42 U.S.C. §1983

Claims under 42 U.S.C. §1983 are governed by the applicable state limitation period - in this instance, Section 214(2) of the New York Civil Practice Rules and Laws, which establishes a three year limitation for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute"

Kaiser v. Cahn,
510 F.2d 282 (2nd Cir., 1974)

Ortiz v. LaVallee,
442 F.2d 912 (2nd Cir., 1971)

Romer v. Leary,
425 F.2d 186 (2nd Cir., 1970)

Swan v. Board of Higher Education of the City
of New York, 319 F.2d 56 (2nd Cir., 1963)

Since the plaintiff commenced this action almost three and a half years after his discharge, his \$1983 claims were time-barred.

The plaintiff cannot circumvent the statute of limitations by seeking equitable relief alone. Where a court has "concurrent" legal and equitable jurisdiction, the statute of limitations controls.

Madison v. Wood, 410 F.2d 564 (6th Cir., 1969)

Swan v. Board of Higher Education of the City
of New York, supra, 319 F.2d at 59-60, n. 5

Conclusion

The decision and order below, dismissing the complaint, should be affirmed.

Dated: New York, New York
December 5, 1975

Respectfully submitted,

THACHER, PROFFITT & WOOD

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